No. 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,

Appellant,

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

HOMER I. MITCHELL
WARREN M. CHRISTOPHER
433 South Spring Street
Los Angeles, California 90013

MARCUS MATTSON
J. PHILLIP NEVINS
605 West Olympic Boulevard
Los Angeles, California 90015

ALOYSIUS F. POWER
ROBERT A. NITSCHKE
NICHOLAS J. ROSIELLO
3044 West Grand Boulevard
Detroit, Michigan 48202
Attorneys for Appellee General Motors Corporation

O'MELVENY & MYERS
HENRY C. THUMANN
DONALD M. WESSLING
LAWLER, FELIX & HALL
ROBERT W. CULVER
Of Counsel

SUBJECT INDEX

Page

Statement 1

Argument 6

Introduction and Summary 6

I

Chevrolet's application of the location provision to prevent dealers' use of discount houses as sales outlets is not an unreasonable restraint of trade 12

A. Chevrolet needs a dependable dealer organization by reason of the nature of the product and market 12

1. To perform functions in aid of manufacturing 13

2. To provide service and parts facilities in convenient locations for consumers 14

3. To push sales of Chevrolets against the competition of other makes 15

B. The Chevrolet franchise plan 16

1. Freedom to sell at any price 17

2. Freedom to sell to anyone, anywhere 17

3. The right number of dealers in the right locations 17

4. The location clause 20

5. Dealer locations in the Los Angeles Metropolitan Area 20

C. The reasonableness of the location clause as applied to dealers' use of discount houses as sales outlets is supported by uncontradicted evidence 22

1. Dealers' use of discount houses as additional sales outlets would impair the franchise plan, causing the smaller dealers to quit and concentrating market power in larger dealers with discount house satellites 23

Page

2. The location clause does not lessen price competition 30

(a) Differences in retail selling prices to the public cannot be inferred from differences in average gross profits per car 32

(b) The arrangements between dealers and discount houses suppressed rather than promoted price competition 38

(c) There is no lack of price competition available for Orange County customers 39

3. The trial court's finding that the franchise location provision promotes competition and benefits the purchasing public is supported by uncontradicted evidence 43

II

In taking action to prevent dealers from using discount houses as additional outlets, General Motors was acting independently and not participating in any plan of the dealers 45

Conclusion 56

Map showing locations of Chevrolet dealers throughout the Los Angeles Metropolitan Area (Defendants' Exhibit A) ..... Opposite p. 20

TABLE OF AUTHORITIES CITED

Cases	Page
Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2nd Cir. 1942); *rehearing denied,* 130 F.2d 196 (2nd Cir. 1942); *cert. denied,* 317 U.S. 695	22
Chicago Board of Trade v. United States, 246 U.S. 231	23
International Boxing Club v. United States, 358 U.S. 242	22
Interstate Circuit, Inc. v. United States, 306 U.S. 208	52, 53
Simpson v. Union Oil Co., 377 U.S. 13	38
Standard Oil Co. v. United States, 283 U.S. 163	22
Theatre Enterprises v. Paramount, 346 U.S. 537	11, 54
United States v. duPont & Co., 351 U.S. 377	22
United States v. Parke, Davis & Co., 362 U.S. 29	53, 54
United States v. Philadelphia National Bank, 374 U.S. 321	23
United States v. Real Estate Boards, 339 U.S. 485	54, 55
United States v. Yellow Cab Co., 338 U.S. 338	22
White Motor Co. v. United States, 372 U.S. 253	7, 12, 17, 23, 53

Statutes	
Sherman Act	1, 22

Rules	
Federal Rules of Civil Procedure Rule 52(a)	22
Local Rules, United States District Court for the Southern District of California, Central Division Rule 7	5

Miscellaneous	
U.S. Census of Population and Housing: 1960 (U.S. Bureau of the Census)	41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 46

UNITED STATES OF AMERICA,

Appellant,

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

STATEMENT

This is a direct appeal from the final judgment of the District Court in a civil antitrust case. The District Court held, after trial, that appellees did not engage in a combination to suppress competition in the sale and distribution of Chevrolet automobiles in the Southern California area in violation of Section 1 of the Sherman Act.

The complaint alleged that General Motors had violated the Sherman Act by inducing and persuading its Chevrolet dealers not to sell Chevrolets through discount

houses and referral services.* Chevrolet dealerships are locally owned and operated by independent businessmen under franchise agreements with Chevrolet (Fdg. 9, R. 1377).** Under these Dealer Selling Agreements, each Chevrolet dealer is free to sell Chevrolets at any price and to any person anywhere he finds a customer; there is no restraint on the retail prices at which the dealer may sell or upon the customers to whom he may sell. The dealer has neither territorial exclusivity nor territorial security (Fdg. 10, R. 1377; R. 330-331, 360, 417). In the early summer of 1960, some Chevrolet dealers in the Southern California area were selling new Chevrolets pursuant to agreements under which discount houses performed many of the merchandising functions normally performed by Chevrolet dealers. These discount houses, which operated at locations removed from the approved location of the Chevrolet dealer involved, maintained new car sales departments which advertised Chevrolets and distributed Chevrolet promotional literature (Fdgs. 18-19, R. 1384-1385).

In the Los Angeles Metropolitan Area, Chevrolets were being sold through 23 discount house outlets (R. 1238-1239). These discount houses were outlets or loca-

---

* Although the term "discount house" in this case carries a misleading inference of lower prices for automobiles, we shall hereafter follow appellant's practice of using "discount house" to cover both discount houses and referral services. The implication of lower prices is misleading because there is no evidence that Chevrolets can be or were purchased for less through discount houses (pp. 30-39, *infra*).

** General Motors Corporation manufactures and distributes Chevrolets through its Chevrolet Motor Division (herein called "Chevrolet"). The operation of the Chevrolet franchise plan is described and discussed at pp. 16-22, *infra*.

tions for the merchandising of Chevrolet dealers' new Chevrolets in addition to the outlets whose number and location had been determined by Chevrolet as optimum for the proper operation of its franchise plan. Dealers' use of these outlets was a way of accomplishing that which was prohibited by the clause (the "location clause") of the Chevrolet Dealer Selling Agreements requiring dealers to refrain from establishing additional locations or branch sales offices without the written approval of Chevrolet (Fdgs. 20, 25, R. 1385, 1388; R. 77-78).*

The practice by some Chevrolet dealers in the Southern California area of regularly using discount houses as sales outlets was first brought to the attention of the General Motors executives in Detroit in November 1960, when they received a large number of letters and telegrams from Southern California dealers and salesmen asking General Motors to do something about the situation. General Motors thereupon made its own investigation and study of the use of discount houses as sales outlets by dealers for all makes of General Motors cars throughout the United States. No dealers or dealer organizations were consulted (Fdgs. 36, R. 1391-1392; R. 362-366, 409-410).

Upon the basis of this study, General Motors, on December 14, 1960, formulated the corporation's position in a letter which was thereafter sent to all of the more than 15,000 Cadillac, Oldsmobile, Buick, Pontiac and Chevrolet dealers in the United States. The letter expressed the corporation's opposition, in the light of the

* The origin and operation of the location clause is described and discussed at pp. 17-20, *infra.*

dealers' obligations under their Dealer Selling Agreements, to arrangements by dealers with discount houses for the sale of the dealers' new cars through such discount houses. It pointed out that such practices could represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the Dealer Selling Agreements. It advised that personnel of the several motor car divisions were being instructed to meet with General Motors dealers for the purpose of attempting to induce and persuade each such dealer to refrain from entering into arrangements for the sale of new General Motors cars through discount houses in violation of his Dealer Selling Agreement (Fdg. 36, R. 1391-1392; R. 741-746, 1303-1323).

Thereafter, acting independently of General Motors, individuals representing the appellee dealer associations shopped discount houses in the Los Angeles Metropolitan Area, and by purchasing new Chevrolets from some dealers through discount houses found that some dealers were continuing to use discount houses as sales outlets. They so informed the Los Angeles Zone Office of Chevrolet, which brought each shopped car to the attention of the dealer who sold it and asked him whether he wished to repurchase the car. The Zone Office, realizing that dealers employ many salesmen, recognized that "it is quite possible for a car to get away from a dealer without him knowing anything about it" (R. 456). This was a way of showing the dealers that "there was a possible violation of the selling agreement" and of trying to "persuade them to stop it" (Fdgs. 41, 42, R. 1393-1394; R. 471).

The District Court heard the testimony of the president of General Motors and of the vice president in charge of distribution, who acted for the corporation in this matter, as well as that of the Los Angeles Chevrolet zone manager who was in charge of carrying out the corporation's instructions. The court found that General Motors had acted independently and without combination, conspiracy or concert of action with the Chevrolet dealers or the appellee dealer associations (Fdgs. 37 and 45, R. 1392-1393, 1395-1396).

By agreement, at the conclusion of the testimony and two weeks prior to final argument, the Court was furnished by each party on July 14, 1964, with a separate set of proposed findings with appropriate record references. After two days of argument, the Court announced its opinion and decision in favor of appellees on August 24, 1964. Under the local rules (Rule 7), the counsel for the successful party prepares the proposed findings and conclusions. In keeping with this practice, the District Judge directed the appellees to submit revised consolidated findings and conclusions which would reflect what he called the "gist of my decisions" (R. 1371-1372). These were lodged with the Court on August 31, 1964. After obtaining an extension of time, appellant, under local Rule 7, filed objections to two of appellee's proposed findings and proposed substitute findings for them on September 10, 1964. The District Court adopted one of appellant's proposed findings and rejected the other, added a paragraph to the conclusions, and signed and filed the findings of fact and conclusions of law on September 14, 1964 (R. 1373-1399).

ARGUMENT

INTRODUCTION AND SUMMARY

A.

Appellant tried this case in the District Court upon the theory that appellees were engaged in a *conspiracy* to prevent sales by Chevrolet dealers through discount houses which appellant characterized as a group boycott — a *per se* violation (R. 1366). Appellant expressly stated that it did not claim that the Chevrolet Dealer Selling Agreement (or its location clause) was an unreasonable restraint of trade in violation of the Sherman Act. In a pre-trial memorandum, appellant stated,

> "Moreover, this case does not attack the provisions in the General Motors contracts with its franchised dealers which General Motors refers to as 'location limitation' clauses. Assuming *arguendo* that General Motors has characterized such provisions accurately, they do not, either separately or collectively, constitute the factual basis for the conspiracy alleged in the Complaint. The Government does not contend that such contracts constitute the violation charged." (Reply Memorandum of September 16, 1963 on Plaintiffs Motion for Informal Pretrial Conference, p. 2, lines 12-18, unprinted)*

---

* References to unprinted portions of the record are necessary by reason of appellant's change in the theory of its case and by reason of its use of unprinted portions of the record in support of its new theory — circumstances which General Motors could not foresee at the time portions of the record were designated for printing.

On the first day of the trial, counsel for appellant said,

"The contract does not form any part of the Government's case. It is not charged to be illegal." (Rep.Tr., June 16, 1964, p. 9, lines 1-2, unprinted)

And in appellant's argument at the end of the trial, the following colloquy took place between the trial court and counsel for appellant:

"THE COURT: But I think we are missing my point. My point that I am trying to find out is: There has to be a conspiracy here to make out a case, isn't that right?

"MR. BLECHER: That is correct." (Rep. Tr., July 27, 1964, p. 961, lines 15-18, unprinted.)

Having lost on the conspiracy charge, appellant now shifts its position and argues that the location clause is an unreasonable restraint of trade as applied to dealers' use of discount houses as sales outlets. This argument is one upon which an economic inquiry is essential. *White Motor Co. v. United States,* 372 U.S. 253, 263. Yet at the time of the trial, appellant regarded an economic inquiry as "not permitted" and urged the Court to "avoid a needless expansive, fruitless inquiry into the realm of ethereal economics."* Indeed, appellant objected to the introduction of evidence regarding the effect of the location restriction on the ground that appellees were guilty of a *per se* violation, and yet it now contends that appellee had the burden during the trial

* Rep. Tr. of Sept. 23, 1963, p. 25, line 24, unprinted; Plaintiff's Objections to Evidence dated June 1, 1964, p. 4, lines 13-14, unprinted.

to prove that the restraint is not unreasonable (Rep. Tr., June 17, 1964, pp. 239, 241, unprinted; Br. 25).

B.

In its argument in this Court, appellant recognizes that certain restrictions on General Motors dealers may be justified in the light of the long-range needs of inter-brand competition, and it states that it is "not attacking the franchise system" (Br. 26-27, 37). Moreover, appellant concedes *arguendo* that "a proliferation of branch locations may impair General Motors' planned spacing of franchised dealers" (Br. 33), thereby assuming the reasonableness of applying the location clause to prevent dealer-operated branch locations. This concession narrows the issue to this: Does the record show that the use of discount houses as sales outlets would be so much less detrimental to the Chevrolet marketing plan than the use of dealer-operated branch locations that a restriction on employing such discount house sales outlets would be unreasonable?

In defending against the conspiracy charge, General Motors contended that it had acted independently in furtherance of its own interests. To prove that there were valid reasons for independent action, it offered evidence showing that dealers' use of discount houses as sales outlets would adversely affect its marketing plan. Focusing squarely on that issue, the District Court found that dealer's arrangements for use of discount houses as sales outlets "have a greater inimical effect on such [franchise] system than the establishment of dealer-controlled branch sales offices" (Fdg. 25, R. 1388). Appellant

does not directly challenge this crucial finding, though it is apparent that the finding must be overturned if appellant is to prevail. Rather, appellant mounts a theoretical argument to the effect that "the restriction on discount house selling is both more restrictive on the dealers and less necessary to General Motors" than the restriction on dealer-operated branch locations (Br. 33-35). That argument is not supported by a single record citation.

C.

In its brief, appellant strains to create the illusion that discount houses are necessary to create price competition in the sale of Chevrolets in the Los Angeles Metropolitan Area. Thus, appellant says that there will be no sales through discount houses if the prices and margins of dealers are "reasonably low" but that sales through discount houses are necessary to break the "artificial price and profit level" (Br. 28-29). Without discount house outlets, so the argument goes, dealers with higher prices will indefinitely escape price competition at their location (Br. 23). This argument reflects so fundamental and far-reaching a misunderstanding of the Chevrolet plan of marketing that it infects appellant's entire argument.

There are 85 Chevrolet dealers in the Los Angeles Metropolitan Area, and the entire area is the zone of responsibility of each of them. Each of them advertises and sells cars throughout the metropolitan area, which is interconnected by high speed freeways and which has one of the most mobile populations in the world.

These 85 dealers price their cars to the public in an absolutely free, highly competitive market which includes

326 dealers of other makes. In establishing his prices, each Chevrolet dealer competes with 84 other Chevrolet dealers each of whom is charged with devoting his principal efforts to the entire area. Moreover, on the average, each of the 85 dealers has five other Chevrolet dealers within five miles of him and many more within easy driving distance, and therefore is subject to vigorous intrabrand as well as interbrand competition.

Where 85 separate dealers are making individual pricing decisions, it is only natural that some will charge more than others. Some will emphasize price in their competitive struggle and others will emphasize service and other factors. But any dealer who is "high priced" in relation to other Chevrolet dealers can expect to see his volume drained off by one of the 84 others in the metropolitan area.

Discount houses are not necessary to create price competition; the 85 dealers do it themselves by competing for customers in a free market. Blanketing the area, these dealers are "in vigorous competition with each other in discounting prices in the sale of Chevrolets" (Fdg. 31, R. 1389). Discount houses are not a "safety valve" providing Chevrolets at which appellant considers "reasonably low" prices. They are simply a way for a dealer to get a second location in violation of his contract.

D.

In the argument that follows, we shall demonstrate that the record in this case requires affirmance of the District Court decision. After describing the necessity for

the Chevrolet plan of marketing and how it operates, we shall show that the location clause is essential to the success of the plan and that it is entirely reasonable and necessary to apply the location clause to prevent dealers' use of discount houses as sales outlets. The District Court found that the location clause, so applied, does not limit price competition (Fdg. 30, R. 1389). There is no evidence to the contrary. As the District Court found, the franchise plan, with the location provision as its keystone, actually enhances competition (Fdg. 33, R. 1390-1391). Among other things, it prevents the concentration of marketing in large dealers with discount house satellites.

The conspiracy argument, which was appellant's sole reliance in the District Court, is all but abandoned in its brief in this Court, with only slightly more than one page of argument being devoted to asserting that General Motors joined the dealers in a program to prevent sales through discount houses (Br. 41-42). Whether General Motors acted independently or acted jointly with the dealers is a question of fact. *Theatre Enterprises v. Paramount*, 346 U.S. 537, 542. On this question of fact, the District Judge heard the testimony of those responsible for General Motors' conduct explain what they did and why they did it. He believed their testimony which showed that General Motors acted independently in furtherance of its own interests and not jointly with any Chevrolet dealers and he so found (Fdgs. 37, 45, R. 1392-1393, 1395-1396). Appellant is not entitled to a trial *de novo* in this Court on this question of fact.

I. CHEVROLET'S APPLICATION OF THE LOCATION PROVISION TO PREVENT DEALERS' USE OF DISCOUNT HOUSES AS SALES OUTLETS IS NOT AN UNREASONABLE RESTRAINT OF TRADE.

The argument in this section is based upon the assumption that the issue of the reasonableness of the location clause as applied here is properly before this Court, although appellant expressly disclaimed challenging it in the trial court. See *supra*, pp. 6-7. To assess the reasonableness of applying the location clause to prevent dealers' use of discount houses as sales outlets, it is essential to know "the economic and business stuff" out of which this action emerged. *White Motor Co. v. United States*, 372 U.S. 253, 263. Accordingly, we commence this argument with a statement of the facts, drawn from the record, showing the need for a dependable dealer organization and a description of the Chevrolet franchise plan. We then demonstrate that the location clause is the keystone of this plan and that its application to prevent dealers from using discount houses as sales outlets is not an unreasonable restraint of trade.

A. Chevrolet needs a dependable dealer organization by reason of the nature of the product and market.

It is essential for Chevrolet to have a dependable dealer organization in order to meet the demands imposed by the nature of the product and the market. The dealer organization must be able to meet the following requirements:

1. **To perform functions in aid of manufacturing.**

The mass production of automobiles requires constant and detailed forward planning, with long lead times for suppliers of raw material and for the subcontractors who fabricate many of the parts used (R. 336-340). Year in and year out, Chevrolet needs dependable dealers in close contact with consumers and capable of reporting data on future consumer demands essential to rational production scheduling at the factory. Chevrolet therefore depends upon dealers whose salesmen have lists of prospects and keep in close touch with Chevrolet owners and others who may be interested in a new car. Dealers make demonstrations, appraise used cars, and try to make sales. Through these close relationships, the Chevrolet dealer can make, each month, an informed estimate of his future requirements in numbers of units and in customer tastes and preferences (R. 315, 336-337, 355). Under the Chevrolet Dealer Selling Agreement, each dealer is required each month to forecast his needs for that month and the ensuing three months (R. 531, 569).

Accurate forecasts from the dealer organization help prevent fluctuations in production which tend to increase costs (R. 357-358). It is an expensive process to change the scheduled flow of production stretching from the plants of raw material suppliers to the dealers' showrooms (R. 338-340). Steady production holds down the price of cars and also contributes stability to a national economy in which one-seventh of all persons gainfully employed work in the automotive industry or in industries serving automotive needs (R. 342-343).

2. To provide service and parts facilities in convenient locations for consumers.

Conveniently available service is essential to the reliable, safe operation of an automobile. It is a complex mobile product with about 2,000 moving parts and requires periodic service in ordinary use (R. 51, 299-301). In addition, warranty obligations and the increasing scope of product liability make it incumbent upon manufacturers to have an adequate number of facilities properly equipped and located to perform every needed service. Chevrolet satisfies this requirement of comprehensive service on a national basis through the network of Chevrolet dealers equipped to meet all service requirements of Chevrolet owners (R. 304-305, 334-335, 537, 544). Also, Chevrolet dealers are a constant source of information concerning product problems and possible defects which may arise in the field after the new car has left the assembly plant. Some of these defects are minor and only annoying; a few may be serious. This flow of knowledge and information is essential to a speedy and effective remedy (R. 332-334).

General Motors attaches such importance to service and safety that it maintains 30 service centers around the country for the training of dealers' service personnel. Over $30,000,000 is invested in these centers, where mechanics and supervisors attend classes and practice using the specialized equipment and tools dealers use to service Chevrolets (R. 301-303).

Convenient service helps make satisfied customers. Since the average new car buyer purchases a car every 3½ years, and since about 70% of Chevrolet sales are to

repeat customers, satisfied customers are the key to success in meeting competition. Adequate service facilities located conveniently to customers are thus necessary tools in selling Chevrolets (R. 75, 301).

Chevrolet cannot depend on come-and-go retailers to perform the important function of offering adequate service and parts to Chevrolet owners at convenient places. It needs dealers who can afford to invest from $70,000 to a maximum of approximately $1,500,000 in the dealership, which includes a parts inventory and specialized service tools required for servicing Chevrolets (R. 209, 303-304, 1382). It needs enough experienced dealers willing to commit their capital for these purposes to assure the Chevrolet owner that convenient and adequate facilities are available to perform whatever service his car may require anywhere in the country. It is not the number of retail outlets which satisfies the service needs of Chevrolet owners, but the year-in, year-out quality of adequately equipped and conveniently located dealer outlets.

3. To push sales of Chevrolets against the competition of other makes.

The intense rivalry among competing makes, which is reflected by the constant changes from year to year in sales rankings of various models and makes, is an ever present threat to any manufacturer's sales standing. A dependable selling organization, devoted to pushing Chevrolets against other makes and located and equipped to reach prospective buyers, is the most, if not the only, effective defense against sales failure.

There are peaks and valleys in the automobile market, during a model year and from year to year. Demand may be affected by model changes, winter weather, business recessions and miscalculations in size, styling or mechanical design. To meet these problems, Chevrolet needs a dealer organization which can be relied upon to create demand during slack seasons and which is capable of surviving lean years, remaining ready to stage a comeback (R. 305-307). For example, dependable dealer organizations helped Buick, Oldsmobile and Pontiac cope with the problems caused by the transition to smaller cars (R. 310-311).

B. The Chevrolet franchise plan.

The Chevrolet plan of marketing is designed to provide Chevrolet with a dependable dealer organization which will perform the essential functions just described. Under this plan, Chevrolet markets its cars by selling them to locally owned and operated independent businesses called "dealers" for resale to customers. Each dealer has a franchise agreement with Chevrolet called a "Dealer Selling Agreement."

Under this agreement, Chevrolet grants to the dealer the non-exclusive right to purchase new Chevrolets in return for his undertaking, among other things, to: (1) resell them in a manner which will promote sales and preserve the goodwill of Chevrolet; (2) perform functions in aid of the manufacturing operation; (3) provide adequate service and parts facilities for Chevrolet owners (R. 515-615).

1. **Freedom to sell at any price.**

Under the franchise plan, Chevrolet dealers in the Los Angeles Metropolitan area and elsewhere are free to sell at any price and they do so. Chevrolet exercises no control over dealer retail prices and the dealer's customer can purchase his car at whatever price he can negotiate (R. 330-331; 360-361).

2. **Freedom to sell to anyone, anywhere.**

All Chevrolet dealers are also completely free to sell to anyone, anywhere and they do so. There is no geographical barrier — neither territorial confinement, territorial security nor territorial exclusivity.* "Cross-selling" is not prohibited. The Chevrolet dealer can send his salesmen anywhere and sell to a customer wherever he can find one. No class of customers is excluded (R. 330).

3. **The right number of dealers in the right locations.**

If Chevrolet dealers are to stand ready, year in and year out, to perform the manufacturing, repair and sales functions, they must have a chance to succeed — a profit opportunity. Unless the dealer has a profit opportunity, he has no incentive to make and maintain the required investment or to hold good salesmen. Ultimately he will be unable to afford to do so.

The former head of the General Motors Dealer Organization Department, who has been studying the problem of marketing motor cars since 1922, described the Chevrolet marketing plan as follows:

---

* Unlike the contracts in *White Motor Co. v. United States*, 372 U.S. 253.

". . . the most effective way for Chevrolet to compete at the retail level against its rivals was to follow a course in the appointment and location of dealers which would give reasonable assurance that during good years and bad and for popular as well as less popular model years, a network of qualified dealers would be operating throughout the country, dedicated to the promotion of the sale of Chevrolets and adequately equipped and staffed and conveniently located to take care of the service needs of Chevrolet owners. This goal could be attained and maintained only if the dealer body, as a group and individually, could foresee a reasonable prospect over a reasonable period of years for a satisfactory return on the heavy investments they were being asked to make. Obviously it was not General Motors' policy to attempt to guarantee profitable operations for each of its dealers" (R. 205-206).

Crucial to the Chevrolet franchised dealer plan is the selection of the right number of dealers located in the right places. Too few or too widely spaced dealer locations would put Chevrolet at a competitive disadvantage by reducing total sales effort and by failing to provide adequate and convenient service and parts supply facilities where consumers need them. Too many or too closely spaced dealer locations would mean inadequate profit opportunity for Chevrolet dealers because of the overabundance of sales outlets compared to potential customer purchasing power. Qualified persons with adequate capital would then be discouraged from undertaking or continuing the substantial investment in facili-

ties, personnel and effort required to sell and service Chevrolets successfully.

Appellant urges that General Motors' desire that each dealer be so located as to have a profit opportunity means that General Motors seeks to limit price competition (Br. 40). Appellant misconceives the function of profit opportunity. The prices charged by the dealer are up to him. What General Motors desires is that each dealer have sufficient sales potential to have a profit opportunity so that if he is diligent and vigorous in the face of competition, he or a qualified successor can exist at a location where a dealer is needed to perform sales and service functions and functions in aid of manufacturing.

The selection of the right number of dealers located in the right places is a continuing process based on comprehensive studies which General Motors has developed over a period of 40 years. The fluidity, change and growth in our economy have made this a complex and year-around task. Because of the availability of motor vehicle registration data in public records (including names, addresses, and makes of cars by model years of all motor vehicle owners and the number of sales made each month by make and model), the sales potential of each neighborhood and community for all makes of cars can be determined with reasonable accuracy (R. 210). Coupling these data with its own extensive field studies and experience, Chevrolet can periodically make an informed judgment as to where Chevrolet dealers should be located and how many there should be (R. 206-218). Chevrolet aims not to put two dealers in a neighborhood which

could support only one. Otherwise it might end up with none.

4. **The location clause.**

The location clause is essential to the objective of having the right number of dealers at the right locations. This clause, which is part of each Chevrolet Dealer Selling Agreement, provides that the business location of each dealer must be specifically approved in writing by Chevrolet and that the dealer cannot establish an additional business location or branch sales office without the prior written approval of Chevrolet (R. 539-540, 578). Chevrolet and not the dealer has the right to determine whether he may establish additional locations (R. 327-328).

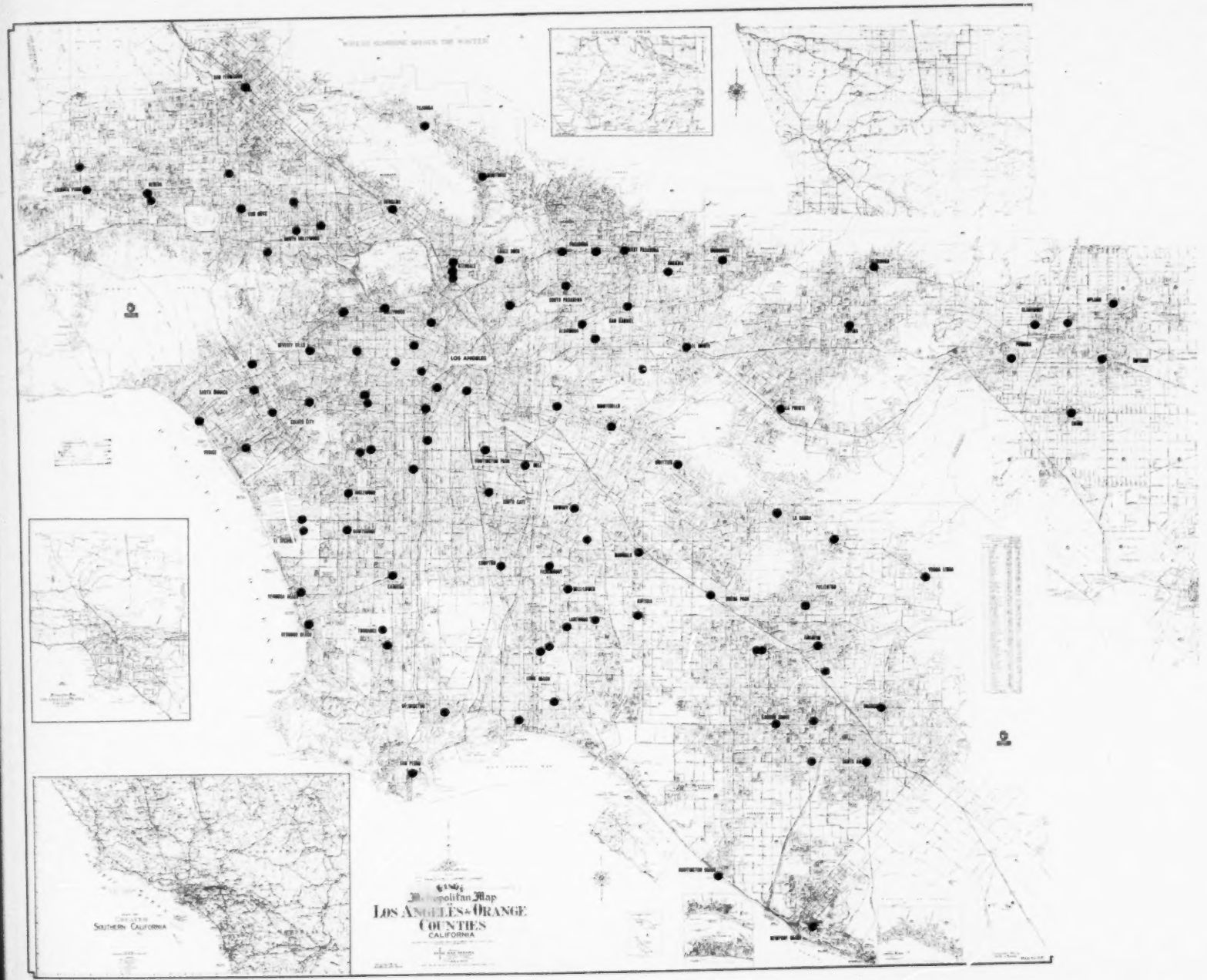
The location clause was adopted in 1940 and is a part of all General Motors Dealer Selling Agreements. It was not adopted at the instigation of the dealers. It was developed by General Motors exclusively to serve its own interests following many years of market analysis and practical experience (R. 213). Its purpose is to prevent dealers, by haphazard action, from destroying the Chevrolet plan of marketing described above.

5. **Dealer locations in the Los Angeles Metropolitan Area.**

The locations of the 85 Chevrolet dealers throughout the Los Angeles Metropolitan Area (which includes most of Los Angeles and Orange Counties) are graphically shown on defendants' Exhibit A, a reproduction of which is inserted between this page and the next page.*

---

* Although the complaint alleged that all Chevrolet dealers in the Southern California area were co-conspirators, the issues at the trial were limited to dealers in the Los Angeles Metropolitan Area.



● Chevrolet Dealer

Los Angeles Metropolitan Area

(Reduced Copy of G. M. Ex. A without numerals on dots)

Defendants' Exhibit B, a similar map, shows the locations of these 85 Chevrolet dealers and of the 326 non-General Motors dealers in five of the competing makes of new cars.*

Under the Chevrolet franchise plan each of the 85 Chevrolet dealers is expected to and does compete for customers throughout the entire area and even beyond. Each dealer's location gives him the advantage of closer contact with and greater convenience to customers in his neighborhood. However, if he does not meet or beat the prices and other competitive efforts of the remaining 84 Chevrolet dealers, so as to convince customers in his neighborhood that he is the best Chevrolet dealer for them, he will be unable to capitalize on this advantage. Thus, the plan is based on a principle of vigorous intra-brand competition among Chevrolet dealers as well as inter-brand competition between Chevrolet dealers and dealers in other brands.

As shown by the map, there is an average of five other Chevrolet dealers within five miles of each of the 85 Chevrolet dealers in the Los Angeles Metropolitan Area (R. 1232; 1240-1260). Within the same five miles there is an average of 22 dealers in competing makes of new cars exclusive of competing General Motors makes *(Ibid.)*.

In the Los Angeles Metropolitan Area, this plan of marketing has resulted in the appointment of both small and large Chevrolet dealers. Those involved in the Price

---

* Enough copies of defendants' Exhibits A and B have been filed with the Clerk so that each member of the Court may have a full-sized copy.

Waterhouse & Co. study (*infra*, pp. 31-38) ranged in 1960 sales volume of passenger cars and trucks from 241 to 4,789 per dealer (R. 1229-1230). That study shows that over 35% of the Los Angeles Metropolitan Area dealers are small dealers selling 700 or fewer Chevrolet passenger cars and trucks per year (R. 1229-1230). The evidence shows that these small dealers will be the first casualties of a policy of permitting dealers to use additional sales outlets, such as discount houses (R. 223-224; 1333).

C. The reasonableness of the location clause as applied to dealers' use of discount houses as sales outlets is supported by uncontradicted evidence.

In direct contradiction to its earlier position, appellant contends on this appeal that the location clause in each Dealer Selling Agreement, as applied to dealers' use of discount houses as sales outlets, is an unreasonable restraint of trade in violation of the Sherman Act* (Br. 21-37). The burden is on appellant to prove this claimed violation. *United States v. duPont & Co.*, 351 U.S. 377, 381; *Standard Oil Co. v. United States*, 283 U.S. 163, 178-179.** And to prove unreasonableness,

* Restrictions against the establishment by a franchised dealer of another business outlet in addition to his approved franchise location were held not violative of the Sherman Act in the only other case considering the question. *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822 (2nd Cir. 1942); *rehearing denied*, 130 F.2d 196 (2nd Cir. 1942); *cert. denied*, 317 U.S. 695.

**On this appeal, appellant has even a greater burden. It is not entitled to a trial *de novo*. It must show that the trial court's findings which are relevant to this contention are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure; *International Boxing Club v. United States*, 358 U.S. 242, 252; *United States v. Real Estate Boards*, 339 U.S. 485, 495-496; *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342.

appellant's burden is to establish *by evidence* "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade v. United States,* 246 U.S. 231, 238; *White Motor Co. v. United States,* 372 U.S. 253, 261. Appellant's attempt to shift to appellees the burden of proving that the location clause as applied to dealers' use of discount houses is not an unreasonable restraint of trade is not supported by any authorities.* However, in this section we shall show that whatever the allocation of the burden of proof, the facts contained in the record establish the reasonableness of the location clause as applied to prevent dealers from using discount houses as additional outlets.

1. **Dealers' use of discount houses as additional sales outlets would impair the franchise plan, causing the smaller dealers to quit and concentrating market power in larger dealers with discount house satellites.**

Appellant recognizes *arguendo* in its brief that establishment of dealer-operated branch locations may impair the franchise system:

"We may concede *arguendo* that a proliferation of branch locations may impair General Motors' planned

* The only case cited by appellant, *United States v. Philadelphia National Bank,* 374 U. S. 321, is far afield. That case did not involve the burden of persuasion or proof. Rather, what the Court held was that it was the Court's duty "to simplify the test of illegality" and that where a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market", the merger will be enjoined unless there is evidence showing that it will not have anticompetitive effects. 374 U.S. at 362-363.

spacing of franchised dealers, as it contends, by depriving some individual dealers of a sufficient profit opportunity for them to bear the burdens imposed by the franchise contract in regard to, for example, servicing, showroom display, inventory, and periodic reports; and, further, that if each dealer were free to penetrate the territories of other dealers by the establishment of branch locations, the dealer's incentive to cultivate intensively his own territory might be reduced." (Br. 33-34)

Appellant goes on, however, to make an entirely theoretical argument which challenges the reasonableness of applying the clause to prevent sales through discount houses — as distinguished from dealer-operated branch locations — and asserts that it is "more restrictive on the dealers and less necessary to General Motors" (Br. 33).

Appellant's unsupported argument contradicts an explicit finding of the trial court:

"The use by Chevrolet dealers of discount houses or referral services as sales outlets for new Chevrolets defeats an important objective of the Chevrolet franchise system and is in derogation of the system. Such arrangements have a greater inimical effect on such system than the establishment of dealer-controlled branch sales offices. They can be established and quickly multiplied with no investment in facilities and with no overhead burden. The quality of their personnel is accidental. They are a way of accomplishing that which is directly prohibited by Paragraph 6 of the Dealer Selling Agreement." (Fdg. 25, R. 1388)

Appellant does not attack this finding as "clearly erroneous." The evidence which supports it is summarized in the remainder of this section.

As early as the 1920's, General Motors had learned from actual experience that too many outlets did not increase demand and, in the long run, weakened rather than strengthened its ability to compete for the available sales (R. 204-205). Accordingly, the Chevrolet plan of marketing is based upon the premise that dealers should be matched to areas of sales and service potentials. If dealers are free to establish additional sales outlets (whether at discount houses or at locations set up by the dealers themselves), all of Chevrolet's careful planning as to how best to compete against other makes of cars can be defeated by the haphazard actions of individual Chevrolet dealers. For that reason, the Dealer Selling Agreement specifically requires the written consent of Chevrolet before a dealer can establish an additional sales outlet (R. 213, 578). It is upon the basis of this provision that Chevrolet refuses to permit dealers to arrange for their cars to be sold at unapproved locations such as discount houses.

The establishment by dealers of unauthorized outlets at discount houses upsets the balance of dealer outlets matched to sales potentials at least as adversely as estab-

lishment of dealer-operated branch offices (R. 191-192).* It is just as reasonable to prohibit dealers' unauthorized use of additional sales outlets at places called "discount houses" as to prohibit dealers' unauthorized use of sales outlets at places called "branch offices."

If the planning potential of the Los Angeles Metropolitan Area is sufficient to support 85 Chevrolet dealers (as Chevrolet's studies show it is), the introduction into the area of 23 additional outlets in the form of discount houses is bound to have an adverse effect on the dealers who are not using the discount houses. As the president of General Motors Corporation testified,

> "Quite a few times in the past I have seen other organizations over-dealered in certain cities of the country. And they always end up in difficulty.
>
> "I think it would be equally applicable here, because what this amounted to would be equivalent, the equivalent of appointment of a number of additional dealer outlets in this area" (R. 420).

If an area is overdealered by the establishment of discount house outlets the more powerful dealers with their

---

* The discount houses through which Chevrolets were sold were places of business performing merchandising functions in the sale of the dealers' Chevrolets (R. 33-35, 106-107, 170-173, 179-180). They advertised widely that Chevrolets could be purchased through them (R. 173-174, 1261-1291). In some instances, the dealers' Chevrolets were displayed for sale at the discount house (R. 179). In some, the discount house had authority to make the sale for the dealer (R. 171). Appellant refers to the discount houses as "sales agencies" of the dealers (Br. 22, 34).

discount house satellites will survive. The smaller dealers will fail or quit (R. 223-224).*

As a consequence, in some areas where Chevrolet needs a dealer to perform functions in aid of manufacturing operations and to provide convenient service and parts facilities, there will be only discount houses. This result is more harmful to the franchise system than a branch location operated by the dealer, as the trial court found (Fdg. 25, R. 1388). Discount houses depend on "floor traffic" and cannot make informed estimates of their future needs. They do not have service or parts facilities.

Moreover, in contrast to a dealer or a dealer-operated branch location, discount houses have no organized system for developing customers for Chevrolets so that General Motors may achieve a level flow of manufacturing and employment and thus hold down costs. Since discount houses do not try to sell Chevrolets, they would tend to sell the most popular make or model of a particular year. Indeed, they avoid even suggesting any make of car (R. 184-185).

---

* The Price Waterhouse & Co. study (discussed *infra*, pp. 31-38) shows, among other things, that it is the small dealer who will be hurt by the use of discount houses as additional sales outlets. Eleven of the fifteen dealers studied whose personnel complained in November 1960 to General Motors in Detroit had sales below the median in volume in 1960 in the Los Angeles Metropolitan Area — Barnett, Cone Bros., Cone Chevrolet, Erskine, Keown, Miller, Ostrom, S & J, Seaboard, Selman and Steves (R. 1229-1230). Owen Keown, a small dealer at Venice, California (671 passenger cars and trucks per year), who is located near a discount house through which Chevrolets were sold (Castle Sales, Inc. at More Department Stores), testified that if nearby discount houses were to reduce his sales by as little as 10 or 15 sales a month, he would not break even (R. 45, 1229).

And discount houses would have no competence for selling Chevrolet trucks, which is almost an engineering assignment (R. 351).

The existence of the discount house as a place of business where Chevrolets can be purchased threatens to dilute the sales potential of the nearby dealer regardless of the comparative prices. There is a psychology that at a discount house, merchandise can be purchased cheaper than anywhere else. As a dealer said,

> "I believe a lot of people went into a discount store just because it had a sign up 'Discount House' and just willy-nilly bought a car without any knowledge as to what the car could be purchased for. Consequently our salesmen would lose the deal." (R. 191)

Other dealers complained that customers were being sold by discount houses before the dealers' salesmen had a chance to sell the customer (R. 156, 474).

Automobile sales are usually engendered on the basis of customer contact and discount houses were, for the dealer, additional sources of customer contact (R. 97-98, 420). Warren Biggs, a Chevrolet dealer who sold cars through discount houses, testified,

> "The important point was that these locations were the basis of contact for the customer, and if there were a referral house three blocks away from me sending customers to a dealer 20 miles away from me, even though that dealer perhaps was not under-cutting me on price, the mere fact that the availability of the contact there for the customer was the important thing,

and I am speaking now from the dealer standpoint." (R. 98)

Appellant expresses concern about "the high degree of concentration at the [automobile] manufacturers' level" and urges that it should not be transmitted to the retail level saying, "While there are few manufacturers, there are many dealers, and competition at the dealer level should be preserved" (Br. 23). The findings and evidence show, however, that the way to preserve competition and avoid concentration at the dealer level is to uphold the location clause, not weaken it. Thus the district court found:

> "The failure to restrict the use of discount houses or referral services as outlets for new Chevrolet cars would, in time, cause the withdrawal from business of a substantial number of Chevrolet dealers." (Fdg. 23, R. 1386)

This finding is supported by uncontradicted evidence showing that if appellant were to succeed in invalidating the location clause as applied to dealers' use of discount houses as sales outlets, the inevitable result would be the destruction of small dealers. The studies of Price Waterhouse & Co. show this (R. 223-224), and experience in the automobile industry has shown that too many outlets cause mortality among dealers (R. 74, 77, 359).

Ultimately, General Motors and other automobile manufacturers would be "left to the device of trying to develop individual customers or markets" in the areas where small dealers were driven out because, as shown above, discount houses cannot perform functions indis-

pensable to the manufacturing and marketing process (R. 346). Every automobile manufacturer has a franchise system comparable to General Motors' system (R. 387) and all the evidence is contrary to appellants' unsupported assertion that excision of the location clause "would not endanger the survival of the franchise system in the automobile industry."

2. **The location clause does not lessen price competition.**

In this Court, appellant argues that the location clause prohibiting dealers' use of discount houses as sales outlets deprives Chevrolet customers of price competition in Orange County and elsewhere (Br. 21-23, 29). This contention is made without support in the evidence.* Indeed, at no time during the trial did appellant offer any evidence of prices charged by any dealers in direct sales vis-a-vis the prices charged by dealers in sales through discount houses.**

---

* Appellant's failure to produce any evidence on this point is perhaps explained by the comment of its counsel at the commencement of the trial:

> "We don't care whether or not the discount houses sold for more or less than the Chevrolet dealers. Unfortunately, we got involved in the prior litigation and had a big to-do about that point which is not really a part of our case and which we propose to eliminate, insofar as we can, from this case." (R. 28)

** In offering in evidence letters and wires of complaint written by dealers and salesmen containing hearsay statements that Chevrolets could be purchased for less through discount houses, counsel for appellant stated that the letters and wires were offered "to show the state of mind of the writer" and "not to establish the fact that the discount houses were, in fact, selling for less than the dealers." Upon the basis of this statement, the letters and wires were admitted in evidence for that limited purpose (R. 295).

General Motors offered in evidence a study by Price Waterhouse & Co. of the prices ordinary retail customers paid for Chevrolets when buying directly from the seven dealers who sold through discount houses as compared with prices paid when buying from those dealers through discount houses. The study concluded that "there was no appreciable difference between the prices paid by customers who purchased Chevrolet passenger cars from a dealer through a discount house or referral service and the prices paid by ordinary retail customers who purchased directly from that dealer."* (R. 224) This is the only evidence in the record on the basis of which the dealers' sales through discount houses can be compared with prices on direct sales by dealers.

The uncontradicted evidence also is that Chevrolet dealers "almost always sold at a discounted price from the manufacturer's suggested list price, which, as a matter of law, has to be stated and affixed to each car that we ship." (R. 361) There was no evidence that there had been a suppression of price competition. Contrary to appellant's argument in this Court, the trial court found that:

"Restricting dealers from selling through discount houses or referral services does not limit price competi-

* General Motors offered this evidence in an attempt to exclude from the case the illusion (unfounded as to marketing of automobiles) that discount houses generally sell for less. The price study was an enormous task requiring 10,000 hours of the time of Price Waterhouse & Co. partners and employees. A Price Waterhouse & Co. partner testified, "We would have liked to have studied the whole 76 [dealers who were in business during all of 1960] but the time requirements to purify all of these data so that you had a decent basis of comparison would have been staggering." (R. 242)

tion. All dealers are free to sell at any price to any customer anywhere and the number and locations of Chevrolet dealers in the Los Angeles Metropolitan Area offer convenient opportunity and adequate choice to potential customers for Chevrolet automobiles to shop the dealers in the area for the most competitive deal. The number and proximity to each Chevrolet dealer of other Chevrolet dealers as well as dealers in rival makes gives the price-conscious purchaser the freedom and ability to pit the price of one dealer against the prices of the others and to give his patronage to the dealer who offers him the best price." (Fdg. 30, R. 1389)

(a) Differences in retail selling prices to the public cannot be inferred from differences in average gross profits per car.

The premise of appellant's economic argument regarding the location clause is that ordinary retail customers paid Orange County dealers a higher price per car than was paid by the same type of customer to Los Angeles dealers. Building on this premise, appellant contends that the location clause suppresses price competition by prohibiting Los Angeles dealers from selling through discount houses in Orange County. Appellant says that

the Orange County dealers were "high-priced" (Br. 29).* Basic to this proposition is the misconception that customers get better automobile bargains through discount houses than directly from dealers. Unable to find in the record any direct proof for this idea, appellant has fastened upon mistaken inferences drawn from average gross profit figures in dealers' financial statements.

Appellant made no attempt during the trial to offer any evidence regarding relative customer prices. In fact, it contended that such prices were not germane to the issues (*supra*, p. 30). Now in its brief appellant seeks to rest its argument upon the fact that the dealers' financial statements show that the average gross profit per car realized by Orange County dealers was $315 compared to $280 for dealers within the City of Los Angeles. Appellant says this comparison is valid because it assumes that since "all Chevrolet dealers buy from the manufacturer at the same price, differences in retail selling price may be inferred from differences in gross profits." (Br. 5) This is erroneous because dealers receive varying bonuses and allowances.

---

* No inference that a dealer is "high-priced" can be drawn from the fact that there are sales through discount houses in his neighborhood. Actually, discount house selling was widely dispersed throughout the metropolitan area. More than 70% of the Chevrolets sold through discount houses in 1960 in the Los Angeles Metropolitan Area were sold through discount houses located outside Orange County. The other 30% were sold through discount houses which had locations both in and outside Orange County (six in Los Angeles County, five in Orange County and one in San Bernardino County). GX 212 does not show the county in which the sales through these discount houses were made but, since only five of the twelve locations were in Orange County, it is probable that less than half of this 30% (no more than 220 Chevrolets) were made through Orange County locations (R. 876-1227).

Appellant errs in stating that Orange County Chevrolet dealers realized $315 average gross profit per Chevrolet in 1960. Two of the ten Orange County Chevrolet dealers (Williams and Miller, GX 286, 258, unprinted) were also Oldsmobile dealers — a fact which appears on the face of their financial statements. Appellant has obtained the $315 figure by including the gross profits these two dealers realized on Oldsmobile sales. Since Oldsmobile's price range is substantially higher than Chevrolet's, the gross profits on Oldsmobiles would tend to be greater than on Chevrolets. Hence the inclusion of Oldsmobile sales in appellant's calculations serves to inflate these dealers' average gross profits per car. The magnitude of appellant's error cannot be calculated from the financial statements but the correct figure is appreciably less than $315.

There are other fundamental errors in appellant's use of the financial statements. As Price Waterhouse concluded and as is clearly shown by the record, average gross profit per car figures taken from dealers' financial statements are not intended to and cannot be used to determine the relative prices paid by ordinary retail customers.* They show how the dealer made out — not how the ordinary retail customer made out (R. 248). This error by appellant can most simply be demonstrated by comparing the dealer financial statements (GX 219, 223, 226, 234, 243, 268, 285, unprinted) and the price

---

* In making its retail price study, Price Waterhouse concluded that it was necessary to make a detailed analysis of the individual dealer and customer invoices and dealer sales journals in order to obtain any meaningful comparison of the prices paid by the ordinary retail customers (R. 251-253).

study made by Price Waterhouse & Co. based on a detailed analysis of the sales journals and other records of the seven Chevrolet dealers which were responsible for 96% of the sales through discounts houses (R. 234, 876-1227).* Two of the dealers studied were Bruder and West Adams. Using appellant's gross profit per car comparison, it would appear that ordinary retail customers buying from Bruder paid an average of $37 less markup per car than such a customer buying from West Adams (GX 223, 285, unprinted). In fact, Price Waterhouse found just the opposite to be true, as shown by the arithmetic mean averages in GX 212 (R. 958, 1226). Bruder sold to its ordinary retail customers at an average of $13 more markup per car than did West Adams — a variance of $50 per car.

Again, using appellant's gross profit per car comparison, it would appear that ordinary retail customers buying from Biggs paid an average of $68 per car more than such customers buying from Courtesy (GX 219, 234, unprinted). Yet Price Waterhouse proved in the same manner that ordinary retail customers buying from Biggs paid only an average of $11 more than such customers buying from Courtesy — a variance of $57 per car (R. 918, 1135).

---

* The "mark-ups" used in the Price Waterhouse study were mark-ups over "dealer invoice" (R. 876-1227). "Dealer invoice" was used because it is the only constant base for determining how the *customer* fared. The gross profits figures calculated from the dealer financial statements show how the *dealer* fared because they are based on the dealer's ultimate costs for his cars after reflecting various incentive bonuses and allowances later credited to him (R. 99, 248).

Both of these variances are greater than the claimed difference of $35 between the average gross profits per car of the Orange County dealers and those located in the City of Los Angeles. When the Price Waterhouse witness was asked whether this type of variation could be as much as $100, he testified: "It could be any amount. Any reasonable amount." (R. 252)

The use of average gross profits per car as calculated from the dealers' financial statements to measure prices to ordinary retail customers is misleading for a variety of reasons. One is that gross profit figures in the financial statements include "special circumstance sales"* such as sales of fleets to commercial users. The Price Waterhouse analysis showed that among the seven dealers studied this type of sale varied from 10% to 40% of the total dealer volume (R. 251). Since this type of sale is usually made at lower prices than sales to ordinary retail customers, using a comparison based on average gross profits per car would make it appear that in all instances the dealers with few fleet sales charge their ordinary retail customers higher prices than dealers with

---

* "Special circumstance sales" are those to a "buyer whose status, position or purchasing power at the time gave that buyer a purchasing advantage * * * * which ordinary retail customers did not have." (R. 235) They include sales of fleets of Chevrolets to the state, counties, municipalities, car leasing corporations, car rental corporations, industrial corporations and other users of "fleets" of cars.

a great number of fleet sales.* The magnitude of this fluctuation is persuasive evidence that the proportion of "special circumstance sales" varies so significantly from dealer to dealer that no meaningful conclusions can be drawn from any average gross profit per car analysis.

Another difficulty is that the gross profit figures include special dealer incentive bonuses and allowances. The Price Waterhouse witness testified, "Now, if a customer purchased a Corvair on April 30 and paid, just to take a rough figure, $2,600, and another customer purchased the same car the next day and paid the same amount, each customer would have made the same deal. But because of an incentive plan that came into being on May 1 the dealer made a different gross profit on those sales." (R. 248) Thus, if one dealer sold a proportionately greater number of Corvairs during the incentive period than did another, the first dealer's average gross profit per car would indicate that customers who bought from him fared less well than customers who bought from the second dealer, while in fact the prices paid by both groups of customers might have been identical.

Another example of this same problem is indicated by the testimony of Warren Biggs that the factory pays each dealer 5% of the factory list price on all hold-over

---

* The general magnitude of this type of variation can be illustrated from the seven dealers whose sales were studied by Price Waterhouse & Co. Using the average gross profit approach, West Adams appears to be $59 per car higher than Courtesy (GX 234, 285, unprinted). However, what their financial statements do not reveal is that 83% of West Adams' non-discount house sales were to ordinary retail customers whereas only 55% of Courtesy's non-discount house sales were to ordinary retail customers (R. 1135, 1226).

models (R. 99). Thus, if one dealer sells few hold-over models and another sells many, all at identical prices, the customers will have fared equally well but the average gross profit per car comparison, used as a basis for comparing prices, would make it appear that the dealer receiving the larger hold-over allowance sold for less.

In short, comparisons of average gross profits per car are meaningless for the purpose of determining whether the location clause suppressed price competition.

(b) The arrangements between dealers and discount houses suppressed rather than promoted price competition.

Rather than promoting price competition, arrangements between dealers and discount houses in many instances inhibited both interbrand and intrabrand competition. Dealers Diversified Services Inc. operating at the Fedco Stores, the largest discount house automobile business in the area, had a "one-price policy" (R. 183-184). Under uniform written agreements, the two Chevrolet dealers doing business with Dealers Diversified Services Inc. were obligated to sell customers referred by the discount house at the same specified price over dealer's invoice cost (Fdg. 32, R. 1390; R. 183-186). *Cf. Simpson v. Union Oil Co.* 377 U.S. 13. Identical forms of contract were used by Dealers Diversified Services Inc. in referring customers to Ford, Plymouth and Rambler dealers (R. 183, 1293-1294).

The adverse effect of these arrangements upon price competition is shown by the fact that in 1960 there were only four Chevrolets sold through Dealers Diversified

Services Inc. at the Fedco Stores at $165 or less* over dealer's invoice cost — not even 1% of the 594 sales through D.D.S.I. — whereas 18.7% of the 1243 direct sales to ordinary customers made by the dealers concerned were at $165 or less over dealers' invoice cost (R. 876-1227).

Fleet Sales Co. (the second largest discount house automobile operation in the area) also had a "one-price" arrangement with each of the three Chevrolet dealers with which it did business. These dealers were obligated to quote the "pre-arranged prices" on a "take it or leave it" basis and could not negotiate lower prices with the referred customers even though the failure to do so might result in the loss of the sale (R. 187-189).

It is significant that 60% of all of the Chevrolets sold through what appellant calls "an alternative method of merchandising" (Br. 24) were sold through these two discount houses operating under "one-price" plans with dealers (R. 876-1227).

(c) There is no lack of price competition available for Orange County customers.

Orange County is not a fenced-off portion of the Los Angeles Metropolitan Area as appellant's argument implies.** Driving by automobile, it is difficult to know

---

* The figure $165 is used here because appellant used it in its Jurisdictional Statement (J.S. 3).

** Discount houses were not concentrated in Orange County. Of the discount house outlets involved in this case, 18 were located in Los Angeles County and 5 in Orange County. Of the 15 dealers shown on GM Exhibit A who complained to General Motors in Detroit about discount house selling, 9 were located in Los Angeles County — Barnett, Drewer-Jones, Erskine, Gledhill, Harbor, Keown, Ostrom, S & J and Seaboard (R. 1232-1239).

when the jagged line between Orange County and Los Angeles County has been crossed. The Los Angeles Metropolitan Area is what its name implies — a single great urbanized and industrialized area. Dealers' television, radio and newspaper advertising reaches potential customers throughout the Metropolitan Area (R. 48-49).

It is common knowledge that automobiles are the principal means of public transportation in the Los Angeles Metropolitan Area. With the highly developed system of freeways interconnecting every part of this area, to drive 15 miles is no distance at all. We have already pointed out the distortions inherent in the use of dealers' gross profits per car figures as a means of attempting to determine comparative prices to ordinary retail customers. But even if such a method as appellant suggests is used, within a 15 mile radius of 8 of the 10 Chevrolet dealers in Orange County in 1960, there was an average of 6 Chevrolet dealers each with an average gross profit per car at or below $280, the City of Los Angeles average as calculated by appellant. (GX 210, 211, 213-286, unprinted.) If these figures were the key to prices to ordinary customers (which they are not), the price conscious Orange County resident would not be lacking an opportunity to shop both in and near Orange County.

Moreover, many Orange County residents work in Los Angeles County or live conveniently close to it and they would have multiple opportunities to shop at many of the 85 Chevrolet dealers located in the metropolitan

area.* The uncontradicted evidence is that the seven dealers who sold through discount houses sold Chevrolets directly to customers at about the same price that they sold through discount houses (R. 1334). Using the Santa Ana Freeway, the Orange County resident more interested in the lowest obtainable price than in neighborhood convenience could easily trade with these dealers or with many others in Los Angeles County. In most instances, customers purchasing through discount house outlets were required to travel to one of the seven dealers using such outlets.

While appellant apparently sees advantage in the fact that discount houses made all makes of cars available "without need for 'bargaining' . . . at stated low prices" (Br. 24), the record shows that the discount house customer would have benefited from the bargaining that typically takes place with a Chevrolet dealer. Discount houses charged the customer whatever he would pay. An examination of GX 212 (R. 877-1227), the basis of the Price Waterhouse & Co. price study, shows that numerous sales through discount houses were made at a mark-up of more than $300 over dealer invoice — some

---

* The 1960 United States Census shows that approximately 25% of the employed residents of Orange County worked in Los Angeles County. The 1960 Census also shows that the vast majority of all Orange County residents lived in the western part of the county which is adjacent to Los Angeles County. (U. S. Bureau of the Census, *U. S. Census of Population and Housing:* 1960.)

more than $400 over dealer invoice.* At discount houses where price fixing schemes were theoretically in operation, the prices did not stay fixed and the customers were charged higher prices.**

The realities of purchasing through discount houses as disclosed by the evidence bear little relationship to the glowing description of such purchasing in appellant's brief.***

A customer dissatisfied with the prices or other competitive efforts of the dealers in his neighborhood will shop and buy in areas beyond. His opportunity to do so is guaranteed by the Chevrolet franchise plan, since all dealers are free to sell to anyone anywhere at any price. There is vigorous price competition in the Los Angeles Metropolitan Area, including Orange County, without the necessity of knocking out the keystone of the Chevrolet franchise system — the franchise location clause as ap-

---

* See, for example, the prices under the column "Mark Up" for "Type of Sale" showing sales through discount houses at $407, $395, $388, $383, $371, $367, $364, $349, $343 over dealer invoice as compared with the median mark-up of $220 for direct sales by the seven dealers studied (R. 1016, 1109, 1057, 1059, 959, 1154, 1009, 881, 985, 1149, 1206).

** See, for example, the prices under the column "Mark Up" for Type of Sale No. 2 (sales through discount houses) for dealers Biggs, Bruder and West Adams. Some sales were for $468, $440, $424, $422, $408, $385, $376, $374, $358, $357, $349, $347, $344 over dealer invoice (R. 912, 916, 1207, 1206, 1205, 910, 906, 920, 878, 913, 950, 1205, 881, 880, 885) as compared with the median mark-up of $220 for direct sales by the seven dealers studied.

***One dealer salesman who handled discount house referrals testified that under the arrangements with the discount house he was "to be very brief, very short, almost to the point of rudeness to the customer. . . . In other words, it was a gimmick type of selling. I was instructed to be exceedingly brief and overbearing in my attitude." The arrangement also was "that there be no dickering about the price" (R. 174).

plied to dealer-operated outlets and to dealers' use of discount houses as sales outlets.

3. The trial court's finding that the franchise location provision promotes competition and benefits the purchasing public is supported by uncontradicted evidence.

The trial court found,

> "The Chevrolet franchise system with its location restrictions and its restrictions against transferring or assigning to third parties sales and service obligations promotes rather than impairs competition in the retail sale of Chevrolet automobiles and benefits the purchasing public. It enhances Chevrolet's ability to compete with other manufacturers, promotes the competition of Chevrolet dealers with dealers selling rival makes and promotes the competition of Chevrolet dealers with each other." (Fdg. 33, R. 1390-1391)

This finding and the trial court's opinion on the same subject (R. 1369) are not challenged by appellant as being "clearly erroneous." They are supported by uncontradicted evidence.

Appellant concedes the reasonableness and lawfulness of restrictions "that on balance promote competition by enabling a company to compete effectively with other brands through an efficient and economical distribution system without unduly restricting competition among its distributors." (Br. 19) We have shown that the franchise location clause is necessary not only to the efficient distribution of the product but also to the efficient manufacture of the product (*supra*, pp. 12-16). Indeed, the Chevrolet

plan of marketing (integrated with the manufactu operations and used to carry out the philosophy tha properly serviced car makes for satisfied customers are repeat customers) makes for better cars at l prices, which is the goal of competition and the mea of its vigor. As the trial court said in its opinion:

> "The evidence clearly discloses that Chevrolet ers are in vigorous competition with each oth discounting the prices in the sale of Chevrolets. insist that a manufacturer and distributor of mobiles is not permitted to select and set up stan for the operation of his dealers upon the theory it was an unreasonable restraint of competition w result not only in the destruction of the compe which benefits the public but would probably inate the distributor system entirely.
>
> "Without such a system it would no doubt b possible for a large manufacturer to plan its pro for new cars each year which entails preparatio planning far beyond the concept of a perso familiar with the business." (R. 1369)

Appellant argues that the location clause l competition in the automobile manufacturing ind by decreasing the feasibility of new entries. App states that the destruction of the location clause " presage the emergence of alternative forms of auto distribution and increase the feasibility of new entr automobile manufacturing" (Br. 24-25). This is speculation without a shred of evidence to supp No present or prospective manufacturer of autom

is required to use a franchise system of marketing and a "new entry into automobile manufacturing" is free to market his product through discount houses if he so chooses.

To achieve success in the manufacture and distribution of automobiles is a complex problem. In solving this problem, all automobile manufacturers show by their conduct that they believe that the franchise system of marketing — with the right number of dealers in the right locations — is indispensable (R. 387). Competition would be impaired, not enhanced, by knocking the keystone out of the system.

II. IN TAKING ACTION TO PREVENT DEALERS FROM USING DISCOUNT HOUSES AS ADDITIONAL OUTLETS, GENERAL MOTORS WAS ACTING INDEPENDENTLY AND NOT PARTICIPATING IN ANY PLAN OF THE DEALERS.

The argument that General Motors committed a *per se* offense by conspiring with its dealers to prevent sales through discount houses is, as we have said, all but abandoned in this Court. What remains of the argument is very narrow indeed, and is flatly contradicted by the findings and the evidence.

In its brief, appellant recognizes that a conspiracy cannot be proved merely by establishing that (1) a number of dealers discussed the problem with each other and called upon General Motors to prevent sales through discount houses (*arguendo*, a practice that General Motors was entitled to forbid its dealers to engage in) and (2) that General Motors applied the location clause to pre-

vent dealers' use of discount houses as additional outlets and thereby facilitated parallel behavior by its dealers (assuming, as appellant does in this portion of the argument, the validity of the clause) (Br. 37-39). Otherwise, as appellant points out, all vertical restrictions upon distributors would become *per se* illegal conspiracies (Br. 38).

Having made these concessions, appellant is left to argue that the dealers entered into a horizontal conspiracy and General Motors joined it. Appellant says the dealers agreed to exert pressure on General Motors to prevent sales through discount houses, and that they thereafter implemented and enforced their agreement (Br. 39-41).*

Then, making a great leap, appellant says that General Motors responded to this pressure and "participated in a single conspiracy" with the dealers (Br. 42). Whether General Motors did so is a question of fact, and on that question the findings, supported by substantial evidence, are directly to the contrary.

Consistently with its oral opinion (R. 1370-1371), the trial court found that, in taking action to prevent dealers from selling through discount houses, General Motors was not joining the dealers in some project or

---

* The only agreement among the dealers found by the trial court was an agreement of members of Losor Dealers Association present at a November 10, 1960 meeting "to write letters or send telegrams and attempt to have their salesmen write letters or send telegrams to General Motors asking that something be done regarding the (discount house) situation." (Fdg. 35, R. 1391) No one from General Motors attended this meeting and General Motors was not a party to the agreement.

program but was solely motivated by a desire to preserve its plan of marketing:

> "The sole motivation for the announced policy and for the instructions given the General Motors personnel was the preservation of the General Motors franchise system, which the Dealer Selling Agreements were designed to effectuate. The General Motors executives in Detroit regarded the arrangements made by dealers for the sale of new General Motors automobiles through discount houses and referral services as violative of their individual Dealer Selling Agreements. Said executives adopted the policy and issued the instructions to the General Motors personnel with respect to discount house and referral service arrangements on the basis of their long experience in the marketing of automobiles and their conclusion that the practice of the use by dealers of discount house or referral service outlets did not give General Motors the retail representation it needed and would in time result in the destruction of the General Motors franchise system." (Fdg. 37, R. 1392-1393)*

In determining that General Motors' action against dealers' sales through discount houses was taken inde-

---

* General Motors' vice president in charge of distribution, who was responsible for the stand taken by General Motors with respect to dealers' use of discount houses as sales outlets, testified,

> "We wanted our dealers to understand that we regarded such arrangements whereby they were regularly selling cars through the medium of these discount houses, in our view, that represented the establishment of another location and that, under those circumstances, we would regard it as a violation of the Dealer Selling Agreement." (R. 394)

pendently and not in collaboration with the dealers or the dealer associations, the court found that "General Motors acted independently in furtherance of its own interests in procuring the conformance of individual Chevrolet dealers to the obligations of their Dealer Selling Agreements and thereby preserving the Chevrolet franchise system" (Fdg. 45, R. 1396). It found further that:

> "Such action [against dealers' sales through discount houses] was taken independently and unilaterally by General Motors with respect to each Chevrolet dealer individually, to obtain compliance by each dealer with the obligations he had undertaken in his Dealer Selling Agreement and such action was not taken by General Motors by combination, conspiracy or concert of action with Chevrolet dealers or any of them or with defendants Losor, Foothill or DSI or any of them." (Fdg. 45, R. 1396)*

The evidence in support of these findings is overwhelming. We have previously summarized the extensive

---

* That the District Judge understood exactly the question of fact he was required to decide is shown by his following comments:

> "THE COURT: What I am getting at, counsel, is this, to enlighten myself, any person who has a legal right might find himself in jeopardy if a noise has been made over on the other side of the street, if he suddenly wakes up and enforces that right, the fact that people are clamoring for it is the proof. What you are saying, in effect, is that that makes him a member of the conspiracy.
>
> * * * * *
>
> "MR. BLECHER: It is a delicate line between —
>
> "THE COURT: The line is delicate between joining a conspiracy and taking independent action, or action that seems parallel, but it is done on your own volition, * * *" (Rep. Tr., June 18, 1964, p. 510, lines 12 to 18; p. 511, lines 3-6, unprinted).

testimony showing (1) the importance to General Motors of the Chevrolet plan of marketing (*supra*, pp. 12-22), and (2) the adverse effect on that plan of permitting dealers to use discount houses as additional sales outlets (*supra*, pp. 22-30, 38-39). This testimony emphatically shows that there were compelling reasons for General Motors to take steps which it regarded as essential for the preservation of its marketing plan without the need for any outside "pressure" (R. 343-345).

General Motors' vice president in charge of distribution testified that the corporation's stand was taken without consultation with any Chevrolet dealers or dealer associations (R. 365). As the executive responsible for the stand taken, he explained its basis as follows:

"Q. Why did General Motors adopt the policy that it did adopt with respect to dealers' use of discount houses?

"A. We adopted it for only one reason. We felt that it would have a very serious and detrimental effect on the operation of General Motors Corporation, and that it eventually would seriously affect the sale of Chevrolet cars and possibly other General Motors products, in the event that the practice was taken up extensively among the other lines * * * and if it did we felt this would destroy the very carefully planned and constructive system of distribution that we had worked for so many years to establish, and in which we had such a very substantial investment of time, effort and money, to bring our operation to the degree of success that we enjoy today." (R. 371-372)

In arguing that the finding that General Motors acted "unilaterally and independently" is erroneous as a matter of law (Br. 42), appellant relies upon *Interstate Circuit, Inc. v. United States*, 306 U.S. 208. The critical difference between this case and *Interstate Circuit* is that the action taken there by a group of motion picture distributors in response to the request from an exhibitor chain was so unusual in character and so unexplained as to rule out the possibility that it was taken independently. In *Interstate*, the exhibitor chain playing first run pictures contemplated and invited common action among the distributors by addressing a joint letter to them in effect demanding that they license their subsequent runs to other exhibitors in a manner which "involved a radical departure from the previous business practices." The distributors carried into effect these unusual demands with "singular unanimity of action" and they failed to call as witnesses any of the officials who were in a position to know of the existence or non-existence of the alleged conspiracy (306 U.S. 221-223). The trial court found that the distributors had agreed and conspired among themselves and this Court affirmed, holding

> "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance." (306 U.S. at 223)

In affirming, this Court held further that even absent agreement of the distributors among themselves, a finding

of conspiracy was justified because "in the circumstances of this case" (as shown by the above described evidence) "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it" (306 U.S. at 226).

In this case, the circumstances are altogether different. Here, the dealers asked General Motors alone to do something which it had a right to do — enforce the location clause of the franchise agreement. The action taken by General Motors was not a radical departure but was entirely consistent with its desire to preserve its franchise plan which had been developed over a forty year period. The responsible General Motors officials all testified at length to facts showing that the action was taken independently by General Motors for its own persuasive reasons of business policy. The trial court's finding that General Motors acted independently was not speculation; it was what substantial and uncontradicted evidence showed. The District Judge heard witnesses who are probably as well informed as anyone in the automobile industry testify on this precise point and he believed them.

Appellant cites *United States v. Parke, Davis & Co.*, 362 U.S. 29 (Br. 41-42), but that analogy is "misleading" and "deceptive" here, just as it was in *White Motor Co. v. United States*, 372 U.S. 253, 266, 268 (concurring opinion). The fundamental difference is that the individual vertical agreements spelled out by the Court in *Parke, Davis* were illegal *per se* because they involved resale price maintenance in the absence of the statutory exception (362 U.S. 45-47). As a result, the "under-

standings" between manufacturer, wholesalers, and retailers in *Parke, Davis* created a combination to achieve an unlawful purpose — the enforcement of the underlying illegal vertical price-fixing agreements.

In contrast, here General Motors was seeking to persuade Chevrolet dealers to comply with the location clause which appellant, in its conspiracy argument, assumes, *arguendo,* was valid (Br. 37). Moreover, as the District Court found, General Motors was acting independently. If General Motors cannot enforce a lawful key clause of the Dealer Selling Agreements because it receives complaints which its dealers have agreed to make, then such dealers would have the power to nullify that clause of the agreements. Neither *Parke, Davis* nor any other precedent requires or supports such a result.

Whether there was joint action or independent action is a question of fact. *Theatre Enterprises v. Paramount,* 346 U.S. 537, 542. Here, the trial judge has decided that issue on the basis of substantial evidence. Appellant's assertion, contrary to the trial court's findings and unsupported by evidence, that General Motors "participated" in what appellant calls the dealers' "collusive effort" (Br. 41-42) does not make it so. It is an attempt to have this court try *de novo* an issue of fact which has been tried and as to which the trial court's findings are not "clearly erroneous." In *United States v. Real Estate Boards,* 339 U.S. 485, 495-496, this Court said,

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' "

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

HOMER I. MITCHELL
WARREN M. CHRISTOPHER
433 South Spring Street
Los Angeles, California 90013

MARCUS MATTSON
J. PHILLIP NEVINS
605 West Olympic Boulevard
Los Angeles, California 90015

ALOYSIUS F. POWER
ROBERT A. NITSCHKE
NICHOLAS J. ROSIELLO
3044 West Grand Boulevard
Detroit, Michigan 48202

Attorneys for Appellee
General Motors Corporation

O'MELVENY & MYERS
HENRY C. THUMANN
DONALD M. WESSLING

LAWLER, FELIX & HALL

ROBERT W. CULVER
Of Counsel

November 1965